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IN THE
COURT OF APPEALS OF INDIANA

DONNA HARLOW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0605-CR-399
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0503-FA-52008

June 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Donna Harlow ("Harlow") appeals the trial court's order granting the State's motion to correct error, effectively denying her motion to suppress evidence stemming from a search of her trash. We reverse.

Issues[1]

Harlow raises two issues, which we reorder and restate as:

I. Whether the trial court erred in that the elected judge ruled on the motion to correct error despite a commissioner presiding over all previous hearings on the case without objection by the State; and

II. Whether the police violated Harlow's rights under the Indiana Constitution against unreasonable searches and seizures in searching her trash.

Facts and Procedural History

On January 7, 2005, the Indianapolis police received an anonymous call from a citizen reporting that a person known as Harlow was dealing drugs from 1229 South Manhattan Avenue.[2] Hesitant to provide any other information, the caller suggested the police watch the home and "draw [their] own conclusion." State's Exhibit 1.

Based on this tip, two police officers watched the home on successive Thursday nights from 10 p.m. until 7 a.m. the next day. They observed several different vehicles come and go, some vehicles from as far away as Evansville, Indiana. During these observation periods,

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[1] Similar issues were raised on appeal by Harlow's husband, facing similar charges resulting from the same trash search, and were addressed in the memorandum decision Harlow v. State, No. 49A02-0605-CR-397 (Ind. Ct. App. February 6, 2007).

[2] The parties stipulated that the affidavit for the warrant and the search warrant itself were admissible for the motion to suppress hearing.

the police officers attempted to pull the trash bags from the home, but were unable to due to "the daylight and the activity." Id.

In mid-March of 2005, a second citizen called the Indianapolis police to anonymously report that the resident at 1229 South Manhattan Avenue was dealing and cooking methamphetamine in the home. This second tipster alleged he had personally seen ounces of methamphetamine in the home.

On March 25, 2005, the two police who had been observing the home set out to make another attempt to pull trash set out for pickup. The trash was set out at approximately 7:30 a.m. The policemen were able to locate and obtain the help of the area trash truck driver to assist them in collecting the trash from the home so that it could be searched. The driver placed the trash from the residence in the truck's empty front scoop and transported the five bags to the pickup truck the police had waiting.

The five trash bags were taken to the State Police Drug Enforcement Section office and searched. Two large marijuana plant stems, several baggy corners, several baggies with corners cut from them, two empty bottles of The Works tub and shower cleaner, two packages of empty lithium batteries, coffee filters with no coffee residue, and two pieces of mail addressed to Harlow were found in the recovered trash. The police applied for and received a search warrant for the home based on the information gathered by the investigation.

The State charged Harlow and her husband John with Conspiracy to Commit

Manufacturing of Methamphetamine, as a Class A felony,[3] Manufacturing Methamphetamine, as a Class A felony,[4] Possession of Chemical Reagents or Precursors, as a Class C felony,[5] and Possession of Marijuana, as a Class A misdemeanor.[6] Harlow moved to suppress the evidence obtained from the warrantless trash search. A duly appointed commissioner of the trial court ("the Commissioner") held a hearing on the motion and granted it on November 29, 2005. On December 13, 2005, the State filed a motion seeking a hearing on good faith, which was denied by the Commissioner on January 27, 2006. On February 27, 2006, the State filed a Motion to Correct Errors and a Motion to Have Presiding Judge Rule on Motion to Correct Errors. On March 31, 2006, the presiding judge held a hearing on the State's motions and reversed the previous rulings of the commissioner in granting the motion to correct errors and denying Harlow's motion to suppress. The interlocutory appeal ensued.

Discussion and Decision

I. Transfer of Case to Elected Judge

Indiana Code Section 33-33-49-32(c), which became effective on July 1, 2005, provides in part:

> A party to a superior court proceeding that has been assigned to a magistrate appointed under this section may request that an elected judge of the superior court preside over the proceeding instead of the magistrate to whom the

[3] Ind. Code § 35-41-5-2; Ind. Code § 35-48-4-1.

[4] I.C. 35-48-4-1.

[5] I.C. 35-48-4-14.5.

[6] I.C. 35-48-4-11.

> proceeding has been assigned. A request under this subsection must be in writing and must be filed with the court:
>
> (1) in a civil case, not later than:
> (A) ten (10) days after the pleadings are closed; or
> (B) thirty (30) days after the case is entered on the chronological case summary, in a case in which the defendant is not required to answer; or
> (2) in a criminal case, not later than ten (10) days after the omnibus date.
>
> Upon a timely request made under this subsection by either party, the magistrate to whom the proceeding has been assigned shall transfer the proceeding back to the superior court judge.

Here, the omnibus date was May 2, 2005. Harlow contends that the State's motion to transfer the case from the Commissioner to an elected judge was untimely. We agree.

The State argues that this statute does not apply, because the statute only applies to magistrates and here, the presiding jurist is referred to as a "commissioner." In Capehart, this Court held that because magistrates and commissioners have identical authority, the legislature intended this statute to apply to both magistrates and commissioners. Capehart v. Capehart, 771 N.E.2d 657, 662 (Ind. Ct. App. 2002). To hold otherwise would "lead to an illogical and absurd result, creating an unprecedented and unexplainable distinction between the judicial powers and duties of magistrates and commissioners." Id. Thus, the statutory time limit does apply and was not met.

The State also makes an argument about the retroactive application of the statute. Although the statute took effect on July 1, 2005, the State did not move to transfer the proceedings until February 27, 2006. At the time of filing the motion to transfer, the statute had been in effect for eight months. Retroactivity is not applicable here, because the motion

was untimely even if the new time limit was started on the statute's effective date.

It was error for the presiding judge to assume jurisdiction pursuant to the State's untimely motion to transfer.

II. Indiana Constitution Article I, Section 11

To promote judicial efficiency, we also address the issue of whether the police violated Harlow's right against unreasonable searches and seizures as provided by Article I, Section 11 of the Indiana Constitution when the police searched Harlow's trash without a warrant.

The standard of appellate review of a trial court's ruling on a motion to suppress is similar to other sufficiency issues. Litchfield v. State, 824 N.E.2d 356, 358 (Ind. 2005). We determine whether substantial evidence of probative value exists to support the trial court's ruling. Id. We do not reweigh the evidence and consider conflicting evidence most favorably to the trial court's ruling. Id.

Article I, Section 11 provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated." In reviewing a governmental search in upholding this constitutional provision, we evaluate the reasonableness of the police conduct under the totality of the circumstances. Litchfield, 824 N.E.2d at 358. Two requirements exist for a search of trash to be reasonable: (1) the trash must be retrieved in substantially the same manner as used by the trash collector; and (2) the officer conducting the search must possess a reasonable suspicion of criminal activity, the same required for a Terry stop. Richardson v. State, 848 N.E.2d 1097, 1101-

1102 (Ind. Ct. App. 2006), trans. denied. The determination of reasonable suspicion is reviewed *de novo*. Id. at 1102.

Harlow concedes that the trash was retrieved in the usual manner, so we need only address the requirement of reasonable suspicion. The reasonable suspicion requirement is satisfied where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur. Lyons v. State, 735 N.E.2d 1179, 1183-1184 (Ind. Ct. App. 2000), trans. denied. Reasonable suspicion entails something more than an inchoate and unparticularized suspicion or hunch, but considerably less than proof of wrongdoing by a preponderance of the evidence. Id. at 1184.

Here the facts known to the officers before they searched the Harlows' trash were based on two anonymous tips and their observation of the home. Without more, an anonymous tip is not likely to constitute reasonable suspicion. Richardson, 848 N.E.2d at 1102. For an anonymous tip to constitute reasonable suspicion, two conditions must be met. First, significant aspects of the tip must be corroborated by the police. Id. This requires that the tip contain information that is not easily obtainable by the general public. Id. Second, the anonymous tip must also demonstrate intimate familiarity with the suspect's affairs and be able to predict the future. Id.

Neither of the anonymous tips here meets the requirements. Both tips alleged that drugs were being dealt from the home. One tip mentions the name Harlow and the other says that the informant had seen methamphetamine at the home. This bare minimum information

does not provide any non-public information that police can readily confirm without a warrant or demonstrate an intimate familiarity with the suspect's affairs. Without more, these tips cannot support a finding of reasonable suspicion.

The observations of the home by police do not result in reasonable suspicion either. All that was observed was a constant flow of visitors on Thursday evenings into the early morning hours. This is not enough to support reasonable suspicion of criminal activity.

The Commissioner properly granted Harlow's motion to suppress.

Conclusion

The trial court erred in transferring the case from the Commissioner to the presiding elected judge based on the State's untimely motion to transfer. The motion to suppress was properly granted by the Commissioner, because the police did not have the requisite reasonable suspicion to search Harlow's trash without a warrant.

Reversed.

SHARPNACK, J., and MAY, J., concur.